BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY A. GOODSPEED	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,550
McCAMBRIDGE BROTHERS CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the December 1, 2010, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was awarded benefits for a 14 percent permanent partial impairment of function to the left lower extremity for injuries suffered on January 9, 2008. Claimant's award was based upon an average weekly wage of $400.00 after the ALJ found that claimant was a full-time worker, expected to work at least 40 hours per week.

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Brent M. Johnston of Roeland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on March 8, 2011.

ISSUES

1. What is the nature and extent of claimant's injuries and disability? Claimant contends that the injury to his left foot caused him to experience pain in his left leg, extending up above his waist, and created chronic pain in both his leg and his hip. Claimant also developed tarsal tunnel syndrome and deep vein thrombosis (DVT) from the injuries. Claimant contends that, as a result, he is permanently and totally

disabled, or at least entitled to an award for a permanent partial general disability. Respondent contends that claimant's award should be limited to the left lower extremity and the award of the ALJ should be affirmed.

2. What was claimant's average weekly wage on the date of accident? Respondent contends that claimant was a part-time hourly worker, working a total of 46.25 hours in the three weeks he worked for respondent. Therefore, his average weekly wage should be $154.17. Claimant argues that the ALJ was correct that claimant was a full-time employee and 40 hours per week should be multiplied times the stipulated $10.00 hourly rate to calculate his average weekly wage at $400.00 per week.

3. Was claimant a full-time or part-time employee of respondent on the date of accident? Respondent contends that claimant was a part-time hourly employee of respondent, pursuant to K.S.A. 2007 Supp. 44-511(a)(4)(B). Claimant contends that he was expected to be available to work from 8:00 a.m. to 4:30 p.m., Monday through Friday. Therefore, he was a full-time employee.

4. Was the fourth edition of the AMA *Guides*[1] properly used to determine claimant's impairment in this matter? Which printing of the fourth edition of the AMA *Guides* should be used herein?

5. Are the opinions and restrictions of Dr. Katt a part of the record for the purposes of this appeal?

FINDINGS OF FACT

Claimant was hired by respondent on December 26, 2007, as a laborer/carpenter. It was claimant's understanding that he was to work from 8:00 a.m. to 4:30 p.m., five days per week, and was to be paid $10.00 per hour, with no overtime planned. On January 9, 2008, claimant was working when a wall landed on claimant's left foot, breaking three bones in his foot. Claimant was provided medical treatment at the St. Francis Health Center Emergency Department and put in a boot cast. Claimant was off work for a few days but returned soon to light duty, driving a rubber tire forklift. However, claimant was unable to do this job as it required that he climb on and off the forklift while loading and unloading materials. Claimant was then taken off work again and never returned to work for respondent.

Claimant was referred to board certified orthopedic surgeon Kenneth Gimple, M.D., on February 15, 2008. Dr. Gimple diagnosed claimant with fractures of the third and fourth metatarsals of his left foot. At the time of the first examination, claimant was off

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

work and Dr. Gimple kept claimant off work for several more weeks. By February 29, 2008, claimant reported improvement with minimal swelling. There was mild tenderness at the area of his fractures. Claimant walked reasonably well but still had poor push-off due to discomfort. Claimant remained off work. Claimant returned on March 21, 2008, for a followup examination. At that time, claimant was accompanied by one of his employers who advised Dr. Gimple that light duty was available. However, claimant refused to do the light duty. Claimant was walking quite well. However, he still did not push off entirely normally. Claimant had excellent motion of his ankle and good subtalar motion with minimal tenderness in the areas of the fractures. He did complain of pain in the posterior tibial tendon area. Claimant was referred for physical therapy for foot and ankle rehabilitation and gait training. Claimant remained off work.

On March 24, 2008, claimant contacted Dr. Gimple advising of ankle/calf/inner thigh pain and calf swelling. Claimant was referred to radiology where he was provided with an ultrasound of the left lower leg. A sonographic evaluation of the left lower extremity venous system was performed, displaying DVT of the lower extremity. Claimant was admitted to St. Francis Health Center for treatment and medication with Coumadin, an anticoagulant. Claimant remained in the hospital until the following Saturday, March 29, 2008.

Claimant was next examined by Dr. Gimple on April 4, 2008, at which time he walked with a very slight limp. Claimant was not swollen or tender in his left calf and there was no tenderness in his thigh. He displayed a full range of motion in the knee. Claimant's ongoing Coumadin treatment was being monitored by his personal physician, Diana Katt, M.D., of Alma, Kansas. Claimant was cautioned of the importance of maintaining his Coumadin therapy, and was to remain on the medication for at least six additional months. Claimant remained off work. In an April 29, 2008, letter, Dr. Gimple opined that claimant would only be able to return to work when cleared by the physicians who were treating his phlebitis, the inflamation of a vein which led to the DVT.

Claimant was next examined by Dr. Gimple on May 5, 2008. Claimant reported that his foot was doing well and he remained on Coumadin. Claimant did not limp and could walk on his heels and toes without difficulty. There was no swelling, deformity or tenderness of the left foot and no ankle or calf swelling. Claimant was released to full duty on that date. Dr. Gimple opined that claimant suffered no permanent physical impairment as the result of the metatarsal fractures. Dr. Gimple also testified that claimant was not limited in his ability to "return to any job on this good Earth".[2] When asked to review a task list prepared by vocational expert Dick Santner, Dr. Gimple stated that claimant had suffered no task loss as the result of his work-related accident as it relates to the metatarsal fractures. Dr. Gimple agreed that the location of the original blood clot was in

[2] Gimple Depo. at 8-9.

the proximal femoral vein which would be the top part of the left leg. The femoral vein runs from the hip to the knee. Dr. Gimple placed no restrictions or task loss on claimant from the DVT as, when Dr. Gimple last saw claimant, he was not at maximum medical improvement (MMI) and remained under treatment for the DVT.

Claimant was referred by his attorney to board certified emergency medicine physician P. Brent Koprivica, M.D., for an evaluation on July 15, 2009. The history provided to Dr. Koprivica was consistent with claimant's injury. Dr. Koprivica noted that claimant had experienced vascular issues in his right lower extremity before January 2008. Claimant then developed the DVT in his left lower extremity after the accident, in part, due to a lack of mobility from the accident.

The Award stated that, after reviewing claimant's medical records, Dr. Koprivica noted that claimant had suffered some vascular issues before the accident on January 9, 2008, experiencing superficial thrombophlebitis, or inflammation of the superficial vein system in both lower extremities.

During his physical examination of claimant, Dr. Koprivica found claimant's left leg to be larger than his right leg. In rating claimant, Dr. Koprivica utilized the fourth edition of the AMA *Guides*[3] which was printed in October 1999. Dr. Koprivica acknowledged that there have been several printings of the fourth edition of the AMA *Guides*[4] and there are some differences in those various printings. Dr. Koprivica testified that, in his experience, the more recent version of the AMA *Guides* would be the correct version.

The AMA *Guides* version used by Dr. Koprivica rated claimant's vascular disease to the lower extremity. Dr. Koprivica assessed claimant a 35 percent left lower extremity impairment at the level of the hip. The reason for that was the venous system impacted from this injury involves the whole lower extremity. Claimant was restricted to an 8-hour day, with appropriate postural allowances of standing and walking intervals of about an hour or with sitting intervals of about an hour with the opportunity to elevate the leg. After reviewing the task list prepared by vocational expert Bud Langston, Dr. Koprivica opined that of the 20 tasks on the list, claimant would be unable to do 18 for a 90 percent task loss.[5]

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (Fourth Printing October 1999).

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[5] The original task list from Mr. Langston had 21 tasks on it, but task # 20, that of "cook", was not on the list provided to Dr. Koprivica.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on November 13, 2009. When claimant saw Dr. Prostic, he complained of recurrent swelling of his left leg, with numbness on the bottom of his foot. It was Dr. Prostic's belief that this most likely came from tarsal tunnel syndrome or swelling about claimant's left foot and ankle. Dr. Prostic testified that one of the complications of phlebitis or blood clots in the venous system is that there is damage to the valves and vessels such that they cannot close properly. The hydrostatic pressure in the lower extremity is greater than it should be, causing edema below the area of damaged valves.

Dr. Prostic performed a physical examination on claimant, finding claimant's left calf was three-quarters of an inch larger than his right calf. Claimant was rated at 20 percent to the whole body, with Dr. Prostic citing Table 14, page 198 of the fourth edition of the AMA *Guides*.[6] However, if Dr. Prostic were to rate the tarsal tunnel syndrome, the result would be a 30 percent impairment to the left lower extremity. Claimant was restricted to limited standing and walking to 40 minutes per hour. The remaining 20 minutes, the left leg should be elevated. After reviewing the task list from Bud Langston, Dr. Prostic opined that claimant was unable to do 18 of the 21 tasks on the list, for an 86 percent task loss. It is noted that in his report, Dr. Prostic found claimant unable to perform 20 of 21 tasks for a task loss of 95 percent.

In using the fourth edition of the AMA *Guides*, Dr. Prostic utilized the first printing from June 1993. In the first printing, the rating for the vascular disease was to the whole person. Dr. Prostic had not reviewed any of the other printings of the fourth edition of the AMA *Guides*[7] at the time of his deposition other than the version of the *Guides* that he had. He was not aware of the subsequent printings of the fourth edition of the AMA *Guides*[8] or that corrections or changes were made in the subsequent printings.

Claimant was referred by the ALJ for an independent medical examination (IME) with board certified disability evaluating physician Peter V. Bieri, M.D., on May 11, 2010. Dr. Bieri diagnosed claimant with non-displaced fractures of the third and fourth metatarsals on the left foot. Claimant then developed DVT in the left lower extremity as the result of the injury. Dr. Bieri assigned claimant a 4 percent left lower extremity impairment for the residuals of the fractures. After considering the preexisting presence of the bilateral vascular disease, and referencing Table 69, Page 89 of the AMA *Guides*,

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[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (June 1993).

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

he assessed claimant a 10 percent left lower extremity impairment for the residuals of the injury. This combined for a total impairment of 14 percent to the left lower extremity.

Dr. Bieri noted the rating by Dr. Koprivica which utilized Table 69, Page 89 of the AMA *Guides*, as well as the rating by Dr. Prostic who used Table 14 on Page 198. However, Dr. Bieri noted that the table used by Dr. Prostic refers to bilateral lower extremity vascular disease and would be inappropriate in this instance. Dr. Bieri also noted that claimant had been previously anti-coagulated, but this treatment was discontinued because of poor compliance. He opined that if claimant had remained on the anticoagulant, the subsequent thrombosis probably would not have occurred following the injury in question. Claimant was limited to occasional lifting to 50 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds of constant lifting. Sustained weight-bearing and ambulation was limited to 2 hours at a time, with 15 minutes for postural adjustment. Claimant was to utilize compression stockings on a daily basis.

Claimant was referred by his attorney to vocational expert Bud Langston on October 23, 2009. The medical history, including the fractures and the blood clot development, was provided, with Mr. Langston having medical records from claimant's ongoing treatment. As of the date of the examination, claimant remained unemployed. However, claimant admitted that he had assisted his son with some rental houses and was directing the crew on activities apparently at the rental houses. A task list was created documenting claimant's past 15-year employment history. Based upon the history and medical documentation provided, Mr. Langston found claimant to be unemployable and totally disabled. His opinion was based on the restrictions of Dr. Katt, claimant's personal physician, that claimant had the ability to only be on his feet or sitting for a combined total of three hours per day. The actual restrictions of Dr. Katt are not in this record except as discussed in Dr. Koprivica's reports and deposition.

Claimant was referred by respondent to vocational expert Dick Santner on October 22, 2010. Mr. Santner was provided with medical records outlining claimant's injury and treatment history. Mr. Santner also created a list of job tasks covering claimant's previous 15-year work history. Claimant again provided a current history of working for his son, overseeing repair work on his son's rental properties. The work was described as sporadic, with some monetary compensation provided for the work, with anywhere from $50 to $400 per month being received. Mr. Santner opined that, based on the restrictions of Dr. Gimple, claimant would be able to return to any of his prior employment situations. Based on the restrictions by Dr. Bieri, claimant could return to work in the medium physical demand area with the need for 15-minute breaks every 2 hours. Mr. Santner determined that claimant could anticipate wages ranging from $7.25 to $9.90 per hour.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.[12]

The Board will first determine the record in this matter. The ALJ held that the opinions of Dr. Katt, claimant's personal physician, are not part of this record. The Board finds that the medical opinions of Dr Katt were recited in the report of Dr. Koprivica. That report was introduced without objection. Therefore, the opinions of Dr. Katt are part of this record to that limited extent. Mr. Langston utilized at least part of these restrictions in reaching his opinion that claimant is permanently and totally disabled. The Kansas Supreme Court addressed this issue in *Roberts,*[13] holding that an opinion formed by a vocational rehabilitation expert, relying upon evidence from a non-testifying health care provider, was based on an insufficient foundation and was, therefore, prohibited by K.S.A. 44-519. The Court rationalized that, while another medical expert may have the training and experience to interpret and evaluate the soundness of other medical

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[9] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2007 Supp. 44-501(a).

[12] K.S.A. 44-519.

[13] *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

reports, a vocational expert does not have medical expertise and would not be competent to assess the soundness of the medical opinion in the report of the health care provider. As such, the opinion of Mr. Langston, which relies upon the opinion of Dr. Katt, cannot be considered.

K.S.A. 2007 Supp. 44-511 states, in part:

> (a) As used in this section:
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> . . .
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> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.
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> (b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> . . .
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> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the

> accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.[14]

Claimant testified that he was hired to work from 8:00 a.m. to 4:30 p.m., Monday through Friday. Patrick F. McCambridge, one of respondent's owners, testified that claimant worked a total of 46.25 hours during claimant's period of employment from December 26, 2007, through January 9, 2008. Mr. McCambridge further testified that there was no customary number of hours constituting an ordinary day in construction as there were just too many variables to consider a typical day. That is why workers were paid by the hour. He agreed that he would keep the workers working as long as there is work and the weather permits. He also agreed that the workers were expected to come to work Monday through Friday and would work an 8-hour day, weather permitting. The Board finds that claimant was expected to work 40 hours per week, as a full-time employee of respondent. Therefore, claimant's average weekly wage would be $400.00 per week as was determined by the ALJ.[15]

K.S.A. 44-510e requires that the fourth edition of the AMA *Guides* be used when determining functional impairments and permanent partial general (work) disabilities. However, as noted herein, there are no less than six different printings of the fourth edition of the AMA *Guides*. Additionally, the versions used by the various medical experts herein differ on how a claimant is to be treated when dealing with vascular diseases in the lower extremities. Dr. Prostic used the first printing and assessed claimant a whole person rating for the DVT. Dr. Koprivica, however, used the fourth printing of the AMA *Guides*, printed in October 1999. He also testified that the more recent version would have corrections from the earlier versions. The fourth printing rated the DVT to the lower extremity rather than to the whole person. The Board finds that the version used by Dr. Koprivica is the most appropriate as it is the printing most contemporary with this injury.

K.S.A. 44-510c states in part:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all

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[14] K.S.A. 2007 Supp. 44-511(a)(4)(5)(b)(4).

[15] See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

> other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[16]

Claimant argues that he is permanently and totally disabled as the result of the metatarsal fractures in his left foot and the resulting DVT in his left lower extremity. However, the only opinion in this record supporting claimant's contention, that of Bud Langston, has been rejected by the Board. The remaining expert opinions find claimant limited in his ability to return to work, but still capable of engaging in substantial and gainful employment. The Board finds that claimant is not permanently and totally disabled.

"It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state."[17]

The Board must next determine the situs of claimant's injury and disability. The initial injury clearly occurred in the left lower extremity, an injury controlled by K.S.A. 44-510d. However, the site of the development of the DVT is not so easily determined. Claimant's blood clot was in the proximal femoral vein which runs from the hip to the knee. The exact location of the clot was never identified in this record. However, Dr. Bieri, the court ordered IME doctor, determined that claimant's impairment was to the left lower extremity as it related to the January 9, 2008, injury and later development of the DVT. Dr. Prostic and Dr. Koprivica differ on whether the AMA *Guides* would find the impairment in the extremity or the whole body. However, the more recent version of the fourth edition of the AMA *Guides*[18] would appear to identify the extremity as the more appropriate site of the disability. The ALJ found, and the Board agrees, that claimant's resulting disability is in the left lower extremity. Dr. Prostic, in his testimony, acknowledges that the fourth edition of the AMA *Guides*[19] states at page 1/5 that the American Medical Association strongly discourages the use of any but the most recent edition of the *Guides,* as, otherwise, the information in it would not be based upon the most recent up-to-date material.[20]

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[16] K.S.A. 44-510c(a)(2).

[17] *Bryant v. Excel Corp.*, 239 Kan. 688, Syl. ¶ 1, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

[18] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (Fourth Printing October 1999).

[19] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (Second Printing January 1994).

[20] As noted by Dr. Prostic, there has now been a 5th edition and a 6th edition of the AMA *Guides* set out by the American Medical Association. How this relates what printing to use versus to the ongoing requirement in Kansas that the 4th edition be used is unclear.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[21]
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> Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . .
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> (16) For the loss of a leg, 200 weeks.[22]

The Board also agrees that the medical opinion of Dr. Bieri, the court ordered IME doctor, is credible in this record. Claimant suffered a 14 percent permanent partial functional impairment to his left lower extremity. But, the opinion of Dr. Bieri is not the only credible opinion in this record. While the Board rejects the opinion of Dr. Prostic due to the more outdated version of the AMA *Guides* he utilized, the opinions of Dr. Gimple and Dr. Koprivica do carry some weight in this matter. It is somewhat difficult to justify the zero percent rating from Dr. Gimple with the 35 percent lower extremity rating from Dr. Koprivica. As is usually the case in these controversies, the truth lies somewhere in between. The Board finds that claimant has suffered a 26 percent permanent partial functional impairment to the left lower extremity from this accident and the resulting injuries. In that regard the Award of the ALJ is modified. But, in all other regards, the Award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

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[21] K.S.A. 44-510e(a).

[22] K.S.A. 44-510d(a)(16).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 26 percent permanent partial functional impairment to the left lower extremity but affirmed in all other regards.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own insofar as they do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 1, 2010, should be, and is hereby, modified to award claimant a 26 percent permanent partial functional disability to the left lower extremity at the level of the leg, but affirmed in all other regards so long as it does not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary A. Goodspeed, and against the respondent, McCambridge Brothers Construction Company, and its insurance carrier, Accident Fund Insurance Company of America, for an accidental injury which occurred on January 9, 2008, and based upon an average weekly wage of $400.00.

Claimant is entitled to 16.57 weeks of temporary total disability compensation at the rate of $266.68 per week totaling $4,418.89, followed by 47.69 weeks at the rate of $266.68 per week totaling $12,717.97 for a 26 percent permanent partial functional disability to the left lower extremity at the level of the leg, making a total award of $17,136.86.

As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's decision to limit claimant's disability to the weeks in the schedules in K.S.A. 44-510d. Claimant's DVT condition constitutes an injury to the body as a whole. The venous and vascular systems are not confined to the lower extremity, and the situs of the disability resulting from claimant's injury to those systems is not contained in the schedules under K.S.A. 44-510d.

In addition, this Board Member disagrees with the majority's decision to exclude the opinion of claimant's vocational expert. Mr. Langston's opinion which relied upon the restrictions recommended by Dr. Katt should be considered. Dr. Katt's restrictions were set out in a report authored by Dr. Koprivica. That report was offered into evidence and admitted without objection and without any limitation on its use.

Finally, this Board Member disagrees with the majority's decision to exclude the opinions of claimant's medical expert. Dr. Prostic's opinion should not have been rejected because he used the first printing of the fourth edition of the AMA *Guides*. The opinion of a physician should be considered regardless of which printing of the fourth edition was utilized. The Kansas legislature only mandated the use of the fourth edition of the AMA *Guides*. It did not specify any particular printing of that fourth edition. The majority finds the last printing to be the most reliable but rules that the printing in effect at a time contemporaneous with the injury should be followed. Medical thinking cannot be frozen in time. Physicians must be given some latitude to account for errors in prior printings and for advances in medical science when rendering their opinions.

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I concur with opinion of the majority with the exception of the decision to exclude the opinion of claimant's vocational expert. I would agree with the above dissent as to that issue.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge